



BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

April 15, 2005

Guy M. Hicks
General Counsel

615 214 6301
Fax 615 214 7406

T.R.A. DOCKET ROOM

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VIA HAND DELIVERY

Hon. Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re *Complaint of XO Tennessee, Inc. Against BellSouth*
Docket No. 04-00306

Dear Chairman Miller:

Enclosed are the original and fourteen copies of BellSouth's *Response to March 29, 2005 Letter on behalf of XO Tennessee, Inc.* Copies of the enclosed are being provided to counsel of record.

Very truly yours,



Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Complaint of XO Tennessee, Inc. Against BellSouth*

Docket No 04-00306

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE
TO MARCH 29, 2005 LETTER ON BEHALF OF XO TENNESSEE, INC.**

BellSouth Telecommunications, Inc ("BellSouth") files this *Response* to the letter filed on behalf of XO Tennessee, Inc. ("XO") on March 29, 2005 asking for clarification regarding the ruling made on February 28, 2005 ("Order") and respectfully shows the Tennessee Regulatory Authority ("Authority" or "TRA") as follows.

XO's letter is an impermissible attempt to expand the scope of the Authority's Order by seeking to resurrect its retroactive credit claim. As an initial matter, there is nothing in the Order for the Authority to clarify. The Authority was quite clear, it denied XO's request for retroactive credits. As stated by Chairman Miller, "I move that XO's request that BellSouth be required to provide credits for the difference in special access and UNE rates retroactively be denied." See February 28, 2005 Transcript, attached hereto as Exhibit A. Accordingly, the Authority should refuse to consider XO's letter.

Additionally, in its letter, XO attempts to raise issues that have not been ruled upon and that should not be resolved until after hearing on the merits of XO's *Complaint*. In fact, XO specifically states twice in its letter that these issues could be resolved in a final order issued following a hearing on the merits of XO's *Complaint*. XO, however, goes on to invite the TRA to address these matters "now". This is inappropriate. XO has already obtained interim relief in advance of a hearing on its

Complaint XO now attempts to broaden that relief to still more issues that are not properly resolved until after this case is heard on the merits

Specifically, XO attempts to litigate now what the *TRO* and *TRRO* require regarding conversions of special access to UNEs. XO attempts to disguise this effort to bypass argument and proceed straight to ruling by casting its inquiry as clarification of the “scope” of the true-up ordered as part of the interim relief by the TRA. It is clear from XO’s letter, however, that these arguments are based on XO’s interpretation of the *TRO* and the *TRRO*. This docket turns on precisely that – the parties’ dispute about the meaning of precisely those two orders, and these issues should be resolved at the **end**, not the beginning, of the case. Moreover, these issues raise factual issues as well, and BellSouth has a due process right to a hearing at which it can present its evidence and challenge XO’s

In the instant case, the TRA will have to decide several important issues that turn on questions of fact. For instance, it appears that XO takes the position that the Current Agreement provides for XO to convert SPA circuits to stand-alone UNES. Not surprisingly, BellSouth takes the opposite position. To the extent there is any ambiguity as to the interpretation of the Current Agreement (although BellSouth states there is none), the Authority may consider parol evidence to decide this factual dispute.

Likewise, under the *TRO*, CLECs cannot convert SPA circuits to UNEs that are currently under contractual arrangements with ILECs. As stated by the FCC: “We decline to require incumbent LECs to provide requesting carriers an opportunity to supersede or dissolve existing contractual arrangements through a

conversion request.” *TRO* at ¶ 587. There has been no determination as to whether any of the subject XO SPA circuits are governed by an existing contractual arrangement. However, as pled by XO in the *Complaint*, it appears that at least some portion of the circuits in question are the subject of a “special access pricing plan.” Unless XO is willing to admit that the subject circuits are not eligible to be converted without incurring the penalties associated with any volume/term contract with BellSouth, then the Commission must resolve this dispute after an evidentiary hearing.

And, to the extent XO can prove that some of the subject circuits are not under contractual arrangement with BellSouth, factual questions exists as to how many circuits are free to be converted, whether these circuits are eligible to be converted, and what additional amounts, if any, does XO owe BellSouth (both in recurring and nonrecurring charges) in converting these circuits to UNEs.

CONCLUSION

It is clear from XO’s conclusion to its letter that XO recognizes that the Authority can resolve these issues in the final order in this case. Specifically, the letter states, “if, however, the Authority is not prepared to address all of these issues in the context of granting the motion for interim relief, XO asks that the Authority clarify that these issues will be addressed in a final order ” It would be inappropriate for the Authority to address these issues in the context of the interim relief, as they have not been briefed, argued or

tried, and they can more properly be addressed following an evidentiary hearing and argument on the merits of this claim

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC

By. 

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

R Douglas Lackey
Andrew Shore
675 W. Peachtree St., NE, Suite 4300
Atlanta, GA 30375

BEFORE THE TENNESSEE REGULATORY AUTHORITY

TRANSCRIPT OF AUTHORITY CONFERENCE

Monday, February 28, 2005

APPEARANCES:

For BellSouth:

Ms. Joelle Phillips

Mr. Guy Hicks

For Chattanooga Gas Company:

Ms. D. Billye Sanders

For Chattanooga Manufacturers

Association, CLECs, and AT&T:

Mr. Henry Walker

For the CAPD:

Mr. Vance Broemel

For Sprint:

Mr. Edward Phillips

For SECCA:

Mr. Charles Welch

For Atmos Energy:

Ms. Misty Kelley

For Tennessee Wastewater Systems:

Mr. Charles Pickney

For Blount County:

Mr. Norman Newton

For TRA Staff:

Ms. Sharla Dillon

Mr. Eddie Roberson

Mr. Richard Collier

Reported By:

Christina M. Rhodes, RPR, CCR

1	INDEX		
2	DOCKET	DISPOSITION	PAGE
3	SECTION 1 - AUTHORITY BUSINESS		
4	Announcements by Director Tate		6
5	04-00205	Rules Approved 4-0	9
6	04-00211	Hearing held at end of docket,	14
7		included in a separate transcript	
8	SECTION 2 - TATE, MILLER, AND KYLE		
9	03-00391	Approved 3-0	15
10	04-00034	Approved 3-0	21
11	04-00174	Approved 3-0	27
12	04-00380	Approved 3-0	28
13	04-00397	Approved 3-0	37
14	05-00030	Approved 3-0	46
15	04-00442	Approved 3-0	47
16	05-00003	Approved 3-0	47
17	05-00005	Approved 3-0	47
18	05-00029	Approved 3-0	47
19	04-00400	Approved 3-0	47
20	04-00425	Approved 3-0	47
21	(Miscellaneous Business - None)		
22	SECTION 3 - MILLER, KYLE, AND JONES		
23	03-00442	Motion approved 2-1 (Jones dissenting)	48
24	03-00502	Approved 3-0	55
25	04-00306	Approved 3-0	55

Page 54

1 deem it appropriate
 2 And at the time we dealt with the same
 3 issue in other dockets, I offered the attorney general
 4 the opportunity to bring forth any injured party, and I
 5 made it clear that if I had an injured party before me
 6 that I would entertain -- in fact, I would make the
 7 motion -- that we convene a contested case, but to date
 8 no one has come forward
 9 Therefore, with -- and I went to the
 10 staff at the time and I asked, Why was it approved in
 11 16 states and there was a contention that it violated
 12 federal law? Nobody could satisfactorily answer that
 13 question for me And so that led me to, while I voted
 14 aye in this docket, to later vote differently in other
 15 dockets on almost identical issues
 16 I appreciate what you said,
 17 Director Jones I think I held that docket for almost
 18 a year because I had an internal debate with the staff
 19 over what we did in that docket I argued that the
 20 point was moot, that the -- that Sprint came in and
 21 withdrew the tariff and there wasn't any reason to
 22 issue the order, and staff and I fought for a year
 23 During that year I became chairman, and so I had a
 24 little more pull on when the order went out
 25 But staff convinced me that we had to,

Page 55

1 as you described, take action -- take -- put down an
 2 order that memorialized what we did, so I signed the
 3 order I didn't read the order, but I signed it, and
 4 so I think that -- I think the order doesn't accurately
 5 reflect what we did And in order of clarification --
 6 and only clarification, I second Director Kyle's motion
 7 and vote aye Thank you
 8 MS DILLON Next we have Docket
 9 No 03-00502, Tennessee Regulatory Authority, workshop
 10 to gather information from the telecommunications
 11 industry related to preventing violations, Tennessee
 12 Code Annotated 65-21-114, consider closing docket
 13 DIRECTOR KYLE Move to close
 14 CHAIRMAN MILLER Second
 15 DIRECTOR JONES I agree
 16 MS DILLON Next we have Docket
 17 No 04-00306, XO Tennessee, Inc., complaint of XO
 18 Tennessee, Inc., against BellSouth and request for
 19 expedited ruling and for interim relief
 20 CHAIRMAN MILLER We have held this
 21 docket in abeyance waiting for the FCC to rule They
 22 have ruled I think everybody has had an opportunity
 23 to look at what they said and I'm ready to make a
 24 motion consistent with the representations I've made
 25 previously in this docket And unless there's an

Page 56

1 objection, I will go ahead and make that motion
 2 (No response)
 3 CHAIRMAN MILLER Seeing none,
 4 consistent with the FCC's orders and previous decisions
 5 of the TRA and with the listings provided by XO on
 6 February 25th, I move that BellSouth should be ordered
 7 on a going-forward basis to convert existing XO special
 8 access circuits to XO UNE circuits at an interim
 9 conversion rate of \$52.73 for initial conversion and
 10 \$24.62 for additional conversions These interim rates
 11 should be trued up once a final rate has been approved
 12 And in order to derive a final rate
 13 for these conversions, I move we require the parties to
 14 submit cost studies no later than April 1st, 2005
 15 Additionally, I move that XO's request that BellSouth
 16 be required to provide credits for the difference in
 17 special access and UNE rates retroactively be denied,
 18 however, for all requests to convert special access
 19 circuits to UNE circuits, subsequent to the Authority's
 20 decision in this docket, BellSouth should begin
 21 changing UNE rates no later than the next billing cycle
 22 after the conversion request is made, and I so move
 23 DIRECTOR KYLE I'm with you Did you
 24 talk about the true up?
 25 CHAIRMAN MILLER Yes, I did

Page 57

1 DIRECTOR KYLE Okay I just want to
 2 make sure --
 3 CHAIRMAN MILLER Would you like me to
 4 reread it?
 5 DIRECTOR KYLE No I just wanted to
 6 get my comments on the record to make sure there was a
 7 true up, and I would vote with you, yes
 8 CHAIRMAN MILLER Director Jones?
 9 DIRECTOR JONES I vote yes
 10 MS DILLON Next we have Docket
 11 No 04-00431, PromisVision Technology, Inc., joint
 12 petition of United American Technology, Inc., and
 13 PromisVision Technology, Inc., for approval of transfer
 14 of customer base, consider transfer
 15 DIRECTOR JONES I would --
 16 CHAIRMAN MILLER Go ahead Please
 17 Please go ahead
 18 DIRECTOR JONES On this petition I
 19 find that the only Authority approval that is needed
 20 for this transaction is the approval of the actual
 21 customer notification letter pursuant to the Authority
 22 Rule 1220-4-2-56
 23 After reviewing that rule and the
 24 proposed customer notification letter, I also find that
 25 the letter in its current form fails to inform the

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2005, a copy of the foregoing document was served on the following, via the method indicated

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Henry Walker, Esquire
Boult, Cummings, et al
414 Union Street, #1600
Nashville, TN 37219-8062
hwalker@boultcummings.com

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Dana Shaffer, Esquire
XO Communications, Inc.
105 Malloy Street, #100
Nashville, TN 37201
dshaffer@xo.com

A handwritten signature in black ink, appearing to read 'Dana Shaffer', is written over a horizontal line. The signature is stylized with a large, sweeping initial 'D' and a long horizontal stroke.